

GUIDELINES FOR CERTIFICATION OF PUBLIC BENEFIT OF NATURAL AREAS FOR CONSERVATION TAX CREDIT

DRAFT (4/24/09)

The North Carolina Natural Heritage Program (NHP) will review applications submitted to the North Carolina Conservation Tax Credit Program for the purposes of fish and wildlife conservation (specifically rare species and their habitats) and/or conservation of natural areas.¹ To achieve either of these purposes, two criteria must be met:

1. The project area must contain natural areas or species of significant conservation value, *or* contribute significantly to their protection; *and*
2. The donation must adequately protect those values in perpetuity.

For these purposes, significant conservation value is defined as the presence of:

1. A rare species,
2. A rare natural community,
3. A good example of a natural community (such as mature forests or intact wetlands),
4. An unusual habitat feature (such as seeps, springs, or den sites), *or*
5. Good general habitat for native species (see criteria below).

Conservation values may be either known to the Natural Heritage Program,² documented in the tax credit application, or recognized through inclusion of the property as a priority area in an adopted local, regional, or state conservation plan, such as the One NC Naturally Conservation Planning Tool.³ If no specific values are known or documented, sites will be evaluated for characteristics that will give them good general habitat value. These characteristics include:

1. Relatively natural or recovering native vegetation – forest or other appropriate vegetation
2. Sufficient size – generally 25 contiguous acres for forest, but occasionally less for other kinds of non-forested natural habitats⁴
3. Lack of fragmentation
4. Connection to other protected lands.

A piece of land may also provide public benefit by helping to protect other significant lands, even if it lacks the above characteristics. Examples of these indirect benefits include buffering of streams to help protect water quality and aquatic habitat, buffering of protected natural areas to protect them from edge effects, and corridors that allow animals to move between connected patches of better habitat.⁵ The land in the project must be in a condition to perform these functions or capable of recovering to appropriate condition with the planned protection.

In order to qualify for conservation tax credit, the conservation values of the property must also be protected in perpetuity. Adequate protection of land requires ownership or oversight by an organization or entity whose mission is to protect the significant conservation values, and provision for such oversight in perpetuity. The public benefit of a transaction can be lost if the conditions of the agreement are not maintained into the future. For both fee simple and conservation easement

donations, the recipient must have the ability to monitor and defend the conservation lands, and must be committed to retaining the public benefit of the land. This type of review may be out of the purview of the resource agency reviewers, such as the Natural Heritage Program, so it will likely be incumbent on the Department of Revenue and Department of Environment and Natural Resources to ensure that recipients are qualified and have sufficient resources to monitor, manage and/or defend conservation lands.

At a minimum, the recipient of a tax credit donation must have the ability to monitor and manage the land, if necessary, and it should be documented that the intent of the transaction is protection of the conservation values of the property. When fee simple interests in real property are donated, one or more of the conservation purposes required by the Conservation Tax Credit statutes may be mentioned in the deed of transfer to describe the intended conservation use. An alternate, less preferable course of action is to have the conservation intent set out in the official minutes of the recipient's acceptance of the land, and a statement that the donation is not required by local ordinance.

It is more complex to determine a recipient's ability to permanently ensure protection by conservation easement. The Natural Heritage Program shall evaluate the recipient's ability and intent to enforce the terms of the easement. The recipient of the easement must monitor the easement and make sure the owner of the underlying fee adheres to the easement terms. Because ownership of the underlying fee interest may change, it is not known how difficult it may be to enforce an easement in the future. Conservation easements will also be reviewed to ensure that the easement terms truly protect the public benefits. Retained rights should not conflict with these benefits. The NHP will consider the cumulative impacts of all retained rights, assuming that all retained rights will eventually be exercised in the most harmful way. Sites must meet the criteria for size, limited fragmentation, and biological value under this worst-case scenario in order for public benefit to be certified.

¹ The General Statutes (G.S. 105-130.34 and G.S. 105-151.12) require that the Department of Environment and Natural Resources (DENR) certify that the donated property is suitable for one or more of the valid public benefits and that the interest in property is donated in perpetuity to and accepted by the State, a local government, or a body that is both organized to receive and administer lands for conservation purposes and qualified to receive charitable contributions. This legislation defines Public Benefit as:

1. Public beach access and use;
2. Public access to public waters or trails;
3. Fish and wildlife conservation;
4. Forestland and farmland conservation;
5. Watershed protection;
6. Conservation of natural areas (as defined by the Nature Preserves Act);
7. Conservation of natural or scenic river areas;
8. Conservation of predominantly natural parkland; or
9. Historic landscape conservation.

The Nature Preserves Act (G.S. 113A-164.3 (3)) defines Natural Area as “an area of land, water, or both land and water, whether publicly or privately owned, that (i) retains or has re-established its natural character, (ii) provides habitat for rare or endangered species of plants or animals, (iii) or has biotic, geological, scenic, or paleontological features of scientific or educational value.”

The Administrative Code (T15A.01F.0102) stipulates that the donation “will continue to fulfill stated conservation

purposes.” This subchapter of the Administrative Code establishes procedure for the certification of conservation value and public benefit of property to be donated to the state, local governments, or qualified environmental organizations for tax credit purposes.

The Internal Revenue Service operates under federal tax laws and regulations for qualifying conservation contributions under the Code of Federal Regulations Title 26 Volume 3 (26CFR1.170A-14). To paraphrase the Federal Regulations, Conservation Purposes are defined as 1) Preservation of land for outdoor recreation by, or the education of, the general public; 2) Protection of a significant relatively natural habitat of fish, wildlife, or plants, or similar ecosystem; 3) The preservation of certain open space; and, 4) Preservation of historically important land area or structure.

The aspect of the Federal Regulations pertinent to the Natural Heritage Program is the protection of natural habitat. The regulations state:

(3) Protection of environmental system--(i) In general. The donation of a qualified real property interest to protect a significant relatively natural habitat in which a fish, wildlife, or plant community, or similar ecosystem normally lives will meet the conservation purposes test of this section. The fact that the habitat or environment has been altered to some extent by human activity will not result in a deduction being denied under this section if the fish, wildlife, or plants continue to exist there in a relatively natural state. For example, the preservation of a lake formed by a man-made dam or a salt pond formed by a man-made dike would meet the conservation purposes test if the lake or pond were a nature feeding area for a wildlife community that included rare, endangered, or threatened native species.

(ii) Significant habitat or ecosystem. Significant habitats and ecosystems include, but are not limited to, habitats for rare, endangered, or threatened species of animal, fish, or plants; natural areas that represent high quality examples of a terrestrial community or aquatic community, such as islands that are undeveloped or not intensely developed where the coastal ecosystem is relatively intact; and natural areas which are included in, or which contribute to, the ecological viability of a local, state, or national park, nature preserve, wildlife refuge, wilderness area, or other similar conservation area.

(iii) Access. Limitations on public access to property that is the subject of a donation under this paragraph (d)(3) shall not render the donation nondeductible. For example, a restriction on all public access to the habitat of a threatened native animal species protected by a donation under this paragraph (d)(3) would not cause the donation to be nondeductible.

² The NC Natural Heritage Program maintains a database of Significant Natural Heritage Areas which contain one or more Natural Heritage elements – high-quality or rare natural communities, rare species, and special animal habitats. A GIS data layer of these sites is available through NC OneMap at <http://www.nconemap.com/default.aspx?tabid=286>. The NHP biennially publishes lists of rare animal and plant species for the state of North Carolina. They are available at <http://www.ncnhp.org/Pages/publications.html>.

³ The One NC Naturally Conservation Planning Tool can be accessed at <http://www.onencnaturally.org/pages/ConservationPlanningTool.html>

⁴ The 25-acre minimum size is intended to maximize habitat for forest interior breeding birds. The NHP recognizes the current standards applied by Maryland’s Partners in Flight program which states that “areas of at least 250 acres (100 ha) are needed to maintain some forest interior bird communities,” but recommends “at the local level, avoid[ing] the loss of even small forests (less than 25 acres, or 10 ha).” The North Carolina Partners in Flight program concurs with a 25-acre threshold for conservation of North American migratory forest interior breeding birds (Mark Johns, personal communication, July 19, 2005).

Contiguous habitat is necessary to minimize edge effects and prevent the negative impacts of roads. Trombulak and Frissell (2000) found that roads are associated with negative effects on biotic integrity in both terrestrial and aquatic ecosystems. Roads can understandably contribute to mortality of organisms through construction or vehicle collision. The Trombulak and Frissell review detailed this information, then added -- at some length -- citations about the direct contributions of roads to: modifications of animal behavior, (including home range shifts, altered reproductive success, altered escape response, and altered physiological state); disruption of the physical and chemical environment; spread of exotic species; and, the cumulative and secondary impacts of increased human use of land and water that roads facilitate.

Haskell (2000) found that even relatively narrow roads can produce marked edge effects – up to 100 meters into adjoining forest.

Applications for properties smaller than 25 acres may be ecologically important if they contain specialized habitats such as an upland depression that provides breeding habitat for amphibians or terrestrial habitat required by aquatic reptiles during certain seasons (Buhlman and Gibbons 1998, Burke and Gibbons 1995).

⁵ Gilliam et al. (1997) identify riparian buffers as the “most effective treatment for overall water quality” protection from nonpoint source pollution. Buffers that are sufficiently wide also protect terrestrial riparian habitat, which benefits many species of flora and fauna (Wenger 1999). Riparian buffers should be at least 300 feet wide. Terms of the easement should include keeping the floodplain and riparian area in as natural a condition as possible, on both sides of a stream as applicable. The cutting or removal of trees, dead or alive, or the disturbance of other natural resources should be discouraged except as necessary for removal of hazards to visitors, control of disease that could damage or reduce the ecological significance of a natural area, restoration after severe storm damage, trail clearance and maintenance, or for purposes of maintenance or restoration of natural communities or rare species populations as stipulated in a management plan accompanying the easement.

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